Supreme Court, U.S.
FILED
SEP 11 2003
OFFICE OF THE CLERK

No. 02-1569

IN THE

# Supreme Court of the United States

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and
LUCENT TECHNOLOGIES INC.,
*Petitioners,*

v.

THE UNITED STATES,
*Respondent.*

**On Petition For A Writ of Certiorari To The United States Court of Appeals for the Federal Circuit**

## PETITIONERS' SUPPLEMENTAL BRIEF

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Pursuant to Sup. Ct. R. 15.8, petitioners AT&T and Lucent wish to call the Court's attention to *Hermes Consolidated, Inc. d/b/a Wyoming Refining Co. v. United States*, No. 02-1460 C, 2003 U.S. Cl. LEXIS 237 (Fed. Cl. Aug. 7, 2003) (denying cross-motions for summary judgment) and *Calcasieu Refining Co. v. United States*, No. 02-1219C, 2003 WL 22049528 (Fed. Cl. July 31, 2003) (unpublished) (denying cross-motions for partial summary judgment). These recent Court of Federal Claims decisions struggle with the confusion created by the Federal Circuit's *AT&T V* opinion below, and thus underscore the need for this Court's review. For example, on the important, recurring issue of whether a government contractor can "waive" an illegal contract or contract term, the *Hermes* opinion emphasizes that as a result of *AT&T V*, there now "appears to be conflicting precedent from the Federal Circuit." 2003 U.S. Cl. LEXIS 237, at *34; *see also id.*, at *3 ("the precedent of the Federal Circuit appears to be of two minds"); at *64 ("the Federal Circuit's law on waiver is not clear"). Only this Court can restore clarity within the Federal Circuit.

1. *Hermes* and *Calcasieu* are two of the pending military jet fuel cases, in which numerous oil companies have filed more than $2 billion in claims against the United States for including an illegal pricing provision in their supply contracts. They are additional cases, unrelated to § 8118 of the Defense Appropriations Act, in which the Government has attempted to deploy *AT&T V* as a new, lethal weapon for summarily terminating any major compensation claim alleging that a federal government contract or contract term is illegal. *See* Petitioners' Reply Br. at 7-8. Indeed, at the same time the Government argues in this Court that *AT&T V* has little relevance to other cases, "[t]he government . . . *argues strenuously* [in *Hermes*] that Judge Plager's dissent [in *AT&T III*] and the *AT&T V* opinion *control* [the *Hermes*] *case*." *Hermes*, 2003 U.S. Cl. LEXIS 237, at *55 (emphasis added).

2. In discussing the background of the *AT&T* litigation, both *Calcasieu* and *Hermes* highlight the way in which the majority opinion in *AT&T V* completely contradicts the Federal Circuit's *en banc* opinion in *AT&T III*. Quoting "an important, if general, statement in the Federal Circuit's *en banc AT&T* III decision," *Calcasieu* indicates "the Federal Circuit recognizes that a contractor may have lost the right to have its contract declared void *ab initio* . . . but may not forfeit a remedy." 2003 WL 22049528, at *10; *see* Pet. App. 48a. Yet, as *Calcasieu* explains, *AT&T V* affirmed the trial court's (inexplicable) holding, on remand from *AT&T III*, "that the statute conferred no protectable interest in its proper application, or no private right of action, so that [AT&T] was not entitled to a remedy." 2003 WL 22049528, at *10. *See also Hermes*, 2003 U.S. Cl. LEXIS 237, at *49 ("the court [in *AT&T III*] held that AT&T, having fully performed on the illegal contract, could nevertheless recover under a theory of implied contract or reformation"), *but also* at *53 ("the crux of the Federal Circuit's holding [in *AT&T V*] was to deny AT&T a remedy").

3. *Calcasieu* explains that in *AT&T V*, "the court's statements about waiver were dicta." 2003 WL 22049528, at *11; *accord Hermes*, 2003 U.S. Cl. LEXIS 237, at *56 (the *AT&T V* waiver discussion "is *dicta* because it is unnecessary for the disposition of the case, which was predicated upon a failure to state a claim"); *see also id.* at *57-*58 (discussing, but not resolving, the question of whether under the "Law of the Circuit" doctrine, the majority opinion of the three-judge panel in *AT&T V* can supersede the majority opinion of the *en banc* panel in *AT&T III*). The Government, however, has continued to flaunt the *AT&T V* majority opinion's gratuitous commentary on waiver as if that *dicta* were binding precedent which compels dismissal of any claim against the United States involving an illegal contract or contract term, where the contractor did not formally object prior to award. For example, in addition to invoking *AT&T V*'s waiver "holding"

in *Hermes*, *Calcasieu* and other pending jet fuel cases, the Government has continued to raise it before the Court of Federal Claims in *Gould, Inc. v. United States*, No. 95-88C, which involves a different military procurement (*see* Pet. Reply Br. at 7-8). More specifically, in a *Gould* reply brief filed subsequent to *Calcasieu*, the Government argues that the *AT&T V* majority *dicta* somehow "make it plain" that certain Federal Circuit precedents "are questionable upon the issue of waiver." Def. Reply Br. at 28 (Aug. 4, 2003).

4. The *Calcasieu* opinion reflects the Court of Federal Claims' uncertainty regarding how to reconcile the waiver *dicta* in *AT&T V* with the Federal Circuit's prior precedent on waiver. For example, the *Calcasieu* opinion observes "that *AT&T* V does not draw a bright line between an infirmity in the nature of the type of contract authorized and one in a pricing provision that translates to a rule on waiver." 2003 WL 22049528, at *11.

5. *Calcasieu* explains that "[t]he dissent in *AT&T* V was aghast that the trial court was not directed to take evidence on this issue before the panel majority opined on waiver." *Id.*, at *11 (citing 307 F.3d at 1382-83 (Newman, J., dissenting)). As a result, the *Calcasieu* opinion "draws . . . the cautionary lesson" that there must be "an appropriate factual record" before "waiver may apply." *Id.* Thus, rather than granting the Government's summary judgment motion on the ground of waiver, the Court of Federal claims indicated in *Calcasieu* that its "decision on waiver will benefit from further development of the record." *Id.* at 14. Similarly, in *Hermes*, the court requested supplemental briefing on the question of whether "a hearing or trial [is] necessary in order to develop a factual record on the issue of waiver." *Hermes*, 2003 U.S. Cl. LEXIS 237, at *66. In stark contrast, and as Judge Newman's dissenting opinion in *AT&T V* emphasizes, the *AT&T V* majority opinion's waiver discussion is based on "hypothesis" and "speculative

theories," not on "evidence or findings" or facts "in the record." Pet. App. 16a-17a. This is necessarily the case because the Federal Circuit and Court of Federal Claims have deprived the petitioners of their day in court.

For the foregoing reasons, and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2003